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IN THE
COURT OF APPEALS OF INDIANA

ADAM A. JENKINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0907-CR-405
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Charles C. Wicks, Judge
Cause No. 20D05-0810-FD-331

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Adam A. Jenkins appeals his conviction and sentence for class D felony theft. We affirm.

Issues

Jenkins raises the following issues for review:

I. Did the State present sufficient evidence to sustain his theft conviction?

II. Did the trial court abuse its discretion in ordering him to pay a fine and court costs without first holding an indigency hearing?

Facts and Procedural History

At approximately 2:10 a.m. on September 30, 2008, Elkhart County Deputy Sheriff Casey Lehman was on patrol in the vicinity of Schupan & Sons' sheet metal business. He observed a green Mercury Villager van parked in a grassy area by the business and, suspecting that a burglary or theft might be in progress, he called for backup. Shortly thereafter, Elkhart County Deputy Sheriff Adam Leeper arrived, and the two officers heard the sound of coughing, talking, and metal hitting metal. They also observed two men, one large and one medium build, dressed in hooded sweatshirts and dark pants, emerging from a creek bed and loading several large army bags into the vehicle. The large man entered the vehicle on the passenger's side, and the medium man took the driver's seat. As the vehicle left the premises, the deputies ran after it, losing sight of it briefly, and then saw the vehicle pull out onto the road. Shortly thereafter, backup officers pulled up behind the vehicle and stopped it. Both of the vehicle's occupants were wearing hooded sweatshirts and dark pants, and the passenger identified himself as Jenkins. The ensuing search of the vehicle produced

thick pieces of copper and aluminum as well as colored copper wire, all of which Schupan & Sons' manager, Jeffrey Neidlinger, identified as the items stolen from the business.

On October 1, 2008, the State charged Jenkins with class D felony theft. On April 23, 2009, a jury found him guilty as charged. On June 15, 2009, the trial court sentenced him to three years in community corrections, with one year suspended to probation. As part of the June 15 order, the trial court imposed a "$1,500 fine + costs w/ $1,000 of fine suspended." Appellant's App. at 104. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Sufficiency of Evidence

Jenkins challenges the sufficiency of evidence to sustain his class D felony theft conviction. When reviewing a claim of insufficiency of evidence, we neither reweigh evidence nor judge witness credibility. *Klaff v. State*, 884 N.E.2d 272, 274 (Ind. Ct. App. 2008). Rather, we consider only the evidence and reasonable inferences most favorable to the verdict. *Id*. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id*.

Theft occurs when a person "knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use." Ind. Code § 35-43-4-2(a). Jenkins essentially challenges the sufficiency of evidence supporting his identity as one of the two men that the deputies observed loading the contraband into the vehicle. He relies on the fact that Deputies Lehman and Leeper did not get a good look at his face during that time, as well as the fact that both deputies briefly lost

sight of the vehicle between the time it left the property and the time he was apprehended. Jenkins essentially asks that we reweigh the evidence, which we may not do. Instead, our examination of the evidence and inferences most favorable to the verdict reveals that Jenkins was apprehended just minutes after he left the property in a vehicle matching the description provided by the deputies. At that time, he was wearing the same clothing and had the same large build as the man the deputies observed loading and entering the vehicle on the passenger's side. Moreover, the deputies testified that they lost sight of the van only briefly and that no other traffic was on the road that night. Finally, both deputies positively identified him as one of the men they observed entering the vehicle. In sum, the evidence is sufficient to affirm Jenkins's conviction.

II. Fine and Court Costs

Jenkins contends that the trial court erred in assessing court costs and a fine without first holding an indigency hearing. Sentencing decisions are left to the trial court's sound discretion and will be reversed only upon a showing of manifest abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. This includes decisions to impose restitution, fines, costs, or fees. *Kimbrough v. State*, 911 N.E.2d 621, 636 (Ind. Ct. App. 2009). With respect to fines, a person convicted of a class D felony may be fined not more than $10,000. Ind. Code § 35-50-2-7(a). "[W]henever the court imposes a fine, it shall conduct a hearing to determine whether the convicted person is indigent." Ind. Code § 35-38-1-18(a). "If the court suspends payment of the fine, the court shall conduct a hearing at the time the fine is due to determine whether the convicted person

is indigent." Ind. Code § 35-38-1-18(b).

With respect to costs, a defendant's indigency does not shield him from all costs or fees related to his conviction. *Id*. If the trial court imposes fees within the statutory limits, there is no abuse of discretion. *Banks v. State*, 847 N.E.2d 1050, 1051 (Ind. Ct. App. 2006), *trans. denied*. Indiana Code Section 33-37-2-3(a) states that when the court imposes costs, it "shall conduct a hearing to determine whether the convicted person is indigent." However, the remainder of the section clearly applies only when the defendant is not indigent. Indiana Code Section 33-37-4-1 does not explicitly require a determination of indigency and requires the clerk to collect from the defendant convicted of a felony a criminal costs fee of $120. The statute goes on to list a variety of additional fees that must be collected from the defendant.

Here, the trial court included in its sentencing order a provision assessing a "$1,500 fine + costs w/ $1,000 of fine suspended." Appellant's App. at 104. At first glance, it appears that the trial court violated the statutory mandate to determine Jenkins's indigency. However, the record indicates that Jenkins has had pauper counsel at all stages of the proceedings. *See Id*. at 17 (trial counsel); *id*. at 106, 111 (appellate counsel). As such, his indigency was already established. A trial court has the authority to assess fines or court costs against an indigent defendant; when it does so, the indigent defendant may not be imprisoned for failure to pay those fines or costs. *Whedon v. State*, 765 N.E.2d 1276, 1279 (Ind. 2002). Thus, the trial court acted within its discretion in assessing fines and costs in its sentencing order. Accordingly, we affirm.

Affirmed.

MAY, J. concurs.

RILEY, J., concurs in part and dissents in part with separate opinion.

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RILEY, Judge, concurring in part and dissenting in part with separate opinion.

I respectfully dissent from the majority's decision affirming the trial court's sentence of Jenkins. While I agree with the majority that the State presented sufficient evidence to establish beyond a reasonable doubt that Jenkins committed theft, I part ways with the majority's treatment of the indigency hearing.

Indiana Code section 33-37-2-3(a) states that when the trial court imposes costs, as was done here, the court "*shall* conduct a hearing to determine whether the *convicted* person is indigent."

(emphasis added). Accordingly, by statute, the trial court has an affirmative duty to conduct an indigency hearing when it decides to assess fines or costs as part of a defendant's sentence. *Briscoe v. State*, 783 N.E.2d 790, 792 (Ind. Ct. App. 2003).

The majority relies on the appointment of pauper counsel to represent Jenkins during the proceedings to conclude that "his indigency was already established." *See* Slip op. p. 5. However, at the time pauper counsel was appointed, Jenkins was not yet convicted. The majority's conclusion makes the statutory language—the *convicted* person—superfluous. In addition, we already found in *Briscoe* that while a trial court's appointment of defense and appellate counsel for a defendant implies a finding of indigency, the appointment of counsel is not conclusive as to the defendant's inability to pay costs. *Id*. at 792 (citing *A.E.B. v. State*, 756 N.E.2d 536, 544 (Ind. Ct. App. 2001)). Therefore, I would reverse the trial court on the imposition of costs and remand with instruction to conduct an indigency hearing.